IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21407

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND ITS LOCAL UNION NO. 769,
Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENTS

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INDEX

	PAGE
JURISDICTION	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT	5
I. The Board erred in concluding that Respondents violated Section 8(e) of the Act	5
A. The agreement with Local 769 related "to the contracting or subcontracting of work to be done" at the construction site	6
B. The agreement with Local 769 was within the scope of the exemption of the construction industry, under the proviso to Section 8(e)	7
1. Statutory language	7
2. Legislative history	7
3. Judicial interpretation	10
II. The Board erred in concluding that Respondents violated Section 8(b)(4)(ii)(A) of the Act	18
III. The Board erred in concluding that Respondents violated Section 8(b)(4)(ii)(B) of the Act	20
A. Respondents' agreement and action relating to work at the Glen Canyon construction site did not violate Section 8(b)(4)(ii)(B)	20
B. The Board erred in concluding that Respondents violated the Act by alleged "sympathetic action" outside the Glen Canyon construction site	23
IV. The Board erred in refusing to find that Respondents were entitled to terminate the agreement because the Davis-Bacon Act was violated on the Glen Canyon site	27

PAGE

A. Rose-Phoenix flagrantly violated the Davis-Bacon Act on the site 27

B. Respondents were entitled to rescind the agreement on that ground 28

CONCLUSION 30

CERTIFICATE 30

Cases

American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965) 22

Boeing Airplane Co. v. Machinists Lodge 751, 91 F. Supp. 596, aff'd. 188 F. 2d 356 (9th Cir. 1951), cert. den. 342 U.S. 821 (1951) 15

Boeing Airplane Co. v. NLRB, 174 F. 2d 988 (D.C. Cir. 1949) 15

Boeing Co. v. UAW, 370 F. 2d 969 (3d Cir. 1967) 16

Carpenters Local 1976 v. NLRB (Sand Door Co.), 357 U.S. 93 (1958) 8

Fiberboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) 17

Houston Insulation Assn. v. NLRB, 386 U.S. 664 26

Int'l Brotherhood of Teamsters (Alexander Warehouse Co.), 128 NLRB 916, 46 LRRM 1409 (1960 26

Laborers Local 383 v. NLRB (Colson & Stevens Co.), 323 F. 2d 422 (1963) 18

Neuffer v. Bakery Union, 307 F. 2d 671 (D.C. Cir. 1962) 16

NLRB v. Allis Chalmers Mfg. Co., U.S. Sup. Ct., 35 LW 4623 (decided 6/12/67), rev'g 358 F. 2d 656 (7th Cir.) 7, 21

NLRB v. Bricklayers Local 5 (Greater Muskegon Assn.), 65 LRRM 2563 (6th Cir. 1967) 21

NLRB v. Brown, 380 U.S. 278 (1965) 22

NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).... 15

PAGE

NLRB v. Houston Chapter AGC, 349 F. 2d 499 (5th Cir. 1965) 18
NLRB v. News Syndicate Co., 365 U.S. 695 (1961) 24
NLRB v. Operating Engineers Local 12 (Engineers, Ltd.), 323 F. 2d 545 (9th Cir. 1963) 17
NLRB v. Plumbers Local 217 (Carvel Co.), 361 F. 2d 160 (1st Cir. 1966) 21
NLRB v. Tom Joyce Floors, Inc., 353 F. 2d 768 (9th Cir. 1965) 18
Northeastern Indiana Building & Construction Council (Centlivre Village Apartments, Inc.), 148 NLRB 854, 57 LRRM 1081 (1964), reversed on other grounds 352 F. 2d 696 (D.C. 1965) 19
Orange Belt Painters Council v. NLRB, 328 F. 2d 534 (D.C. Cir. 1964) 12, 13
Packinghouse Local 721 v. Needham Packing Co., 376 U.S. 247 (1964) 16
Plumbers Local 5 v. NLRB, 321 F. 2d 366 (D.C. Cir. 1963), cert. den. 375 U.S. 921 (1963) 12
Sacramento Navigation Company v. Salz, 273 U.S. 326 (1927) 29
Sheet Metal Workers Local 48 v. Hardy Corporation, 332 F. 2d 682 (5th Cir. 1964) 10
Suburban Tile Center, Inc. v. Rockford Building and Construction Trades Council, et al., 354 F. 2d 1 (7th Cir. 1965) 12
United Electrical Workers v. NLRB (Marathon Electric Co.), 223 F. 2d 338 (D.C. Cir. 1955), cert. den. 350 U.S. 981 (1956) 15
Watson Brothers Transportation Company v. Jaffa, 143 F. 2d 340 (8th Cir. 1944) 28
Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 (1967) 8
Case No. F-228, Adm. Ruling of General Counsel, 41 LRRM 1140 (1957) 26

Statutes

Davis Bacon Act, as amended, 74 Stat. 418, 78 Stat. 238, 40 U.S.C. 276a 3
National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq. 1
Section 8(a)(1) 5
Section 8(a)(3) 17
Section 8(b)(1) 21
Section 8(b)(1)(A) 17
Section 8(b)(2) 5
Section 8(b)(4) 7, 16, 26
Section 8(b)(4)(ii)(A) 8, 9, 19, 20, 23
Section 8(b)(4)(ii)(B) 8, 11, 12, 20, 21, 22
Section 8(b)(4)(B) 8, 19
Section 8(e) 6, 7, 8, 11, 17, 19, 20, 22, 23
Section 10(e) 1

Miscellaneous

17 Corpus Juris Secundum Contracts, para. 330, pp. 299, 301 (1963) 16
17A C.J.S. Contracts Sec. 422(1), p. 521 (1963) 15
Holmes, Jr., *The Path of the Law,* 10 Harv. L. Rev. 457 (1897) 14
Jones, *Specific Enforcement of Hot Cargo Provisions in Collective Bargaining Agrements,* 6 UCLA L. Rev. 85 (1959) 12
II Leg. Hist. P. 989 10
II Leg. Hist. p. 1433 9
II Leg. Hist. pp. 1829-1830 10
Williston, Contracts, Sec. 670 28
Williston, Contracts, Secs. 683, 893A (3d ed.) 15

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On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE RESPONDENTS

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board to enforce its order (R. 125-126)[1] issued on August 31, 1965 against the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") and its affiliated Local Union No. 769 ("Local 769"). 154 NLRB 839. This Court has jurisdiction of the proceeding under Section 10(e) of the National Labor Relations Act, as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.* The alleged unfair labor practices occurred at the Glen Canyon Dam Construction site in northern Arizona, within this judicial circuit.

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[1] References to the pleadings reproduced as "Volume I, Pleadings" are designated "R". References to the stenographic transcript of the hearing filed with the Court are designated "Tr".

COUNTER-STATEMENT OF THE CASE

Ets-Hokin & Galvan, Inc. ("Ets-Hokin"), an electrical and general contractor, is incorporated in California and does business in various States (R. 46; Tr. 31). The U. S. Bureau of Reclamation awarded to Ets-Hokin prime contracts totaling $20,691,271 for an electrical powerhouse and transmission lines in Glen Canyon, Arizona (G.C. Exh. 2). In October 1962, Ets-Hokin entered into a subcontract with Rose Construction Company, Phoenix Division ("Rose-Phoenix") to construct certain steel towers and other structures at the Glen Canyon site (R. 47: Tr. 87).

Ets-Hokin has maintained collective bargaining contract relationships with Respondent IBEW and its locals since 1920 (Tr. 63). In 1962 and at all subsequent times here involved, Ets-Hokin was subject to agreements with IBEW Locals covering work at the sites of its various construction jobs, including the Glen Canyon site, which provided in part as follows:

> "The Local Unions are a part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of any other Local Union of the IBEW, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective bargaining representative of this or any other such Local Union by the Employer, will be sufficient cause for cancellation of this agreement, after the facts have been determined by the International Office of the Union."

In January 1963, contrary to Ets-Hokin's agreement, Rose-Phoenix invited Local 428 of the Union of Operating Engineers to organize its employees at Glen Canyon (Tr. 330). Shortly thereafter, Rose-Phoenix executed an agreement recognizing Local 428 as the exclusive bargaining agent and sole source of personnel on the project (R. 47; Tr. 282; Resp. Exh. 5). The agreement provided for wage scales below the rates paid to journeymen linemen under the Local 769 contract and required to be paid pursuant to

the Davis-Bacon Act as amended (40 U.S.C. 276a). These lower rates motivated Rose-Phoenix in contracting with Local 428 (Tr. 322, 305, 312). On Rose-Phoenix insistence, the clause requiring compliance with the Davis-Bacon Act was stricken from the agreement with Ets-Hokin (Tr. 141, G.C. Exh. 17). The Bureau of Reclamation found that the job classifications and rates actually made effective by Rose-Phoenix violated the Davis-Bacon Act (Resp. IBEW Exh. 7), and directed changes which Rose-Phoenix persisted in violating (Tr. 325-326).

During the period January-March 1963, Respondents repeatedly advised Ets-Hokin that it was violating the agreement,—by subcontracting to Rose-Phoenix which had no agreement with Respondents, and by paying wages below the prevailing scales and standards at the Glen Canyon site (Tr. 88-95, 101). The undisputed record shows that Rose-Phoenix had deceived Ets-Hokin by pretending that it had an agreement with Respondents (Tr. 51, 53, 79, 136, 249-250, 294). Otherwise Ets-Hokin would not have considered Rose-Phoenix for the Glen Canyon project (Tr. 36). By this deception, Rose-Phoenix had "made country boys" out of Ets-Hokin (Tr. 79). Upon ascertaining the facts, Ets-Hokin readily admitted it was in violation of its agreement with Respondents; and throughout this period it sought only a sufficient opportunity, which Respondents afforded, to correct the situation voluntarily and amicably (Tr. 70-71, 156-157, 254-255). Ets-Hokin testified that there were advantages to operating as a union contractor; that it was the policy of the Ets-Hokin company to deal with union subcontractors; and that it had always been a union contractor and it "proposes to stay that way for a number of reasons" (Tr. 78-79). In April 1963, Ets-Hokin terminated the subcontract to Rose-Phoenix under an agreed settlement to pay $50,000 plus a generous allowance for equipment (R. 52; Tr. 273; Ets-Hokin Ex. 1-B). Ets-Hokin thereupon undertook the construction job directly, and performed the work in accordance with its agreement

with Local 769, including the above quoted "annulment clause" and a non-discriminatory referral system (Tr. 59).

All the company witnesses having dealings with Respondents during this period testified without contradiction that no picketing or work stoppages occurred or were threatened at Glen Canyon or any other Ets-Hokin construction job, and that Respondents made no threat, suggestion or demand to withdraw workers or to refuse referral of workers to the Glen Canyon or other Ets-Hokin construction jobs (Tr. 78, 147, 177-178, 225). The Board made no finding to the contrary (R. 118-125). Moreover, only IBEW President Freeman was authorized by the union constitution to find the facts on the basis of which Local 769 might terminate the Ets-Hokin agreement, under the annulment clause or otherwise (Tr. 89, 95). Freeman's correspondence with Ets-Hokin made no threat of any kind (G.C. Exh. 4).

The Trial Examiner found that Respondents violated Sections 8(b)(1)(A) and 8(b)(2) and Ets-Hokin violated Sections 8(a)(1) and 8(a)(3) by "causing" termination of Rose-Phoenix's employees. On these issues, the Board reversed the Examiner and dismissed the complaint. The Board found that the Respondents "had the right to insist, albeit not by proscribed means, that the employer subcontract work only to IBEW subcontractors" as required by the "subcontracting clause" (R. 125). The Board construed the subcontracting clause as applicable only to the construction site (R. 119-120), and upheld its validity under the following proviso to Section 8(e):

> "Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

There is no appeal before the Court on these issues.

The Trial Examiner and the Board also found, however, that the "termination clause" of the contract was not saved by the foregoing proviso, and violated Sections 8(e), 8(b)(4)(ii)(A), and 8(b)(4)(ii)(B) of the Act. The Board ordered Respondents to cease and desist from entering into, maintaining, or enforcing the termination clauses of the contract; and further ordered Respondents to cease and desist from threatening, coercing, or restraining Ets-Hokin or any other person to enter into an agreement prohibited by Section 8(e) of the Act, or to cease doing business with Rose-Phoenix or any other person (R. 125-126). Board Member Fanning concurred in dismissing the complaint with respect to Sections 8(b)(1), 8(b)(2), 8(a)(1), and 8(a)(3) of the Act, and dissented from the conclusions and order concerning Sections 8(e) and 8(b)(4).

SPECIFICATIONS OF ERROR

Respondents specify that the Board erred—

1. In concluding that Respondents violated Section 8(e) of the Act.

2. In concluding that Respondents violated Section 8(b)(4)(ii)(A) of the Act.

3. In concluding that Respondents violated Section 8(b)(4)(ii)(B) of the Act.

4. In refusing to find that Respondents were entitled to terminate the agreement because the Davis-Bacon Act was violated on the Glen Canyon site.

ARGUMENT

I. The Board Erred in Concluding that Respondents Violated Section 8(e) of the Act

Ets-Hokin, the prime contractor here involved, has maintained contract relationships with IBEW locals since 1920; and the particular clauses here involved predate the enact-

ment of the 1959 amendments to Section 8 relied upon by the Respondents and the Board respectively. The Board did not find, and could not find on this record, that Respondents caused a strike, picketing, or handbilling against any employer or other person, or threatened any such action against anyone (Tr. 77-78). The Board did not find, and could not find on this record, that any employee left work, or that any applicant was refused referral for work, at any time, or that Respondents threatened any such action at any time (Tr. 147). There is no finding that the Respondents in any way threatened "no contract no work". See dissent by Board Member Fanning (R. 131).

On these facts, the Board erred in finding that Respondents violated Section 8(e) of the Act.

A. The agreement with Local 769 related "to the contracting or subcontracting of work to be done" at the construction site

The Board expressly found (R. 119-120):

> "At all times material to this case, Ets-Hokin had been engaged in electrical contracting in the building and construction industry. The contract itself is one which was entered into between the IBEW and the National Electrical Contractors of America. The scope of the agreement covers work normally done at the construction site, such as pole line construction, steel and metal construction, highway lighting systems, and electrical underground construction. Throughout the agreement the term 'construction' appears frequently. It is clear that the contract provisions refer to construction work. It was also stipulated at the hearing that the contracting clauses are found only in contracts with the IBEW applicable to the construction industry and that Ets-Hokin was performing the type of work found in the contract. Upon the basis of the foregoing, we find that the subcontracting clause applies, and was intended to apply, only to on-site construction work".

The Board's brief in this Court (p. 2) states that the unfair labor practices before this Court in this proceeding "occurred at the Glen Canyon Dam construction site in northern Arizona, within this judicial circuit".

B. The agreement with Local 769 was within the scope of the exemption of the construction industry, under the proviso to section 8(*e*)

1. *The statutory language of the construction industry exemption* in Section 8(e) reads:

> "Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

This language is unqualified and all-embracing. It covers agreements relating to the contracting of work, as well as the subcontracting of work, at the construction site. It clearly embraces and validates every clause in the agreement between Local 769 and Ets-Hokin, discussed above.

The Board erred by giving a literal construction to Section 8(b)(4) instead of interpreting and applying that provision together with Section 8(e), in the true statutory context as intended by Congress.

2. *Legislative history* "may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question". *NLRB v. Allis Chalmers Mfg. Co.,* U.S. Sup. Ct., 35 L.W. 4623, 4624 (decided 6/12/67). "That principle has particular application in the construction of labor legislation, which is 'to a marked degree, the result of conflict and compromise between conflicting forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their

respective interests' ". *Carpenters Local 1976 v. NLRB (Sand Door Co.),* 357 U.S. 93, 99-100 (1958); *Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612, 619 (1967).

The legislative history of the construction industry exemption fully sustains Respondents' interpretation. Section 8(e) and the construction industry proviso were inserted at the same time in 1959 by the Conference Committee considering bills which eventuated in the Labor-Management Reporting and Disclosure Act of 1959. In the same legislation, Congress enacted the amendments to Section 8(b)(4)(A) and (B), upon which the Board relies. The legislative history was traced by this Court in *Laborers Local 383 v. NLRB (Colson & Stevens Co.),* 323 F. 2d 422 (1963). More recently the Supreme Court said in the *Woodwork* case, *supra,* 386 U.S. at 634-635:

> "Section 8(e) simply closed still another loophole. In *Local 1976, United Brotherhood of Carpenters v. Labor Board (Sand Door),* 357 U.S. 93, the Court held that it was no defense to an unfair labor practice charge under §8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion material. However, the Court emphasized that the mere execution of such a contract provision (known as a 'hot cargo' clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under §8(b)(4)(A). Section 8(e) was designed to plug this gap in the legislation by making the 'hot cargo' clause itself unlawful. The Sand Door decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of 'hot cargo' clauses, but also to create a situation in which such clauses might be employed to exert subtle pressure upon employers to engage in 'voluntary' boycotts. . . . This loophole closing measure likewise did not expand the type of conduct which §8(b)(4)(A) condemned".

The Supreme Court added (386 U. S. at 637-638):

> "However, provisos were added to § 8(e) to preserve the status quo in the construction industry . . . [The] construction proviso [is] a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there. . . ."

Senator Curtis, a co-sponsor of the bill submitted by Senator Goldwater, referred to the so-called "secondary boycott provisions" of the Act (Section 8(b)(4)(A) and (B) as follows:

> "The secondary boycott provisions of the Act rest upon a combination of two factors: First, an objective of the union must be to compel one person to cease doing business with another; second, the means employed to achieve this objective must be through a strike or inducement of employees to strike" (II *Leg. Hist.* 989).

Senator John F. Kennedy explained the import of the construction exemption in the legislative debate:

> "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under Section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.
>
> "It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract." [II *Legislative History of Labor-Management Reporting and Disclosure Act of 1959* "(Leg. Hist.") p. 1433].

Senator Goldwater had printed in the Congressional Record an analysis by Michael Bernstein, Minority Counsel for the Senate Labor Committee, stating in part:

> "But a building-trades union may enter into a contract with a contractor—building contractor—whereby he agrees that he will not let work to any subcontractor who is not union. This is not illegal. Now here is what it may do: The union may go into court and sue him if he fails to live up to that agreement. But they cannot strike or picket him to make him live up to it, which is the law now" (II *Leg. Hist.* 1829-1830).

In brief, reading together all the 1959 amendments discussed above, labor organizations in the construction industry remain free to make agreements relating to the contracting or subcontracting of work at the construction site, and to enforce these agreements by judicial action. What they cannot do is to achieve such enforcement by striking or picketing in violation of Section 8(b)(4)(ii)(B).

3. *Judicial interpretation of the construction industry exemption clearly upholds Respondents' contentions.*

In *Sheet Metal Workers Local 48 v. Hardy Corporation*, 332 F. 2d 682 (5th Cir. 1964), the plaintiff union sued under Section 301 of the Taft-Hartley Act for a declaratory judgment, damages for breach, and a mandatory injunction to compel arbitration of a contract clause providing that—

> "No employer shall subcontract or assign any of the work described herein which is to be performed at a job site to any contractor, subcontractor or other person or party who fails to agree in writing to comply with the conditions of employment contained herein including, without limitations, those relating to union security, rates of pay and working conditions, hiring and other matters covered hereby for the duration of the project" (p. 683).

The District Court held the clause valid under Section 8(e) and issued a declaratory judgment, but denied enforcement remedies, and also dismissed defendant's counterclaim for damages. 218 F. Supp. 556 (N.D. Ala. 1963). The Fifth Circuit reversed. After reviewing the statutory language and legislative history, substantially as outlined above, the Court said:

> . . . It follows that the agreement here is exempted from the operation of § 8(e), and is thus valid and otherwise subsisting insofar as the Labor Act is concerned. It may not, however, be enforced by threats, coercion or restraint.
>
> "The reasoning applied by the District Court in denying judicial enforcement of the agreement was that such a course of action would amount to coercion within the contemplation of § 8(b)(4)(ii)(B), albeit through court processes and not a form of economic pressure or self help. Thus is the question presented.
>
> "While the authorities to sustain this or a contrary view are admittedly sparse, we are constrained to a view opposite that of the District Court. This will avoid the anomalous situation of an agreement, left valid under one section of the Act but unenforcible by threat, coercion or restraint under another section, being rendered of little or no value by an interpretation of coercion to embrace the use of the courts. These sections were enacted concurrently and we think clear language would be necessary to convey a congressional intent that a party to an otherwise valid labor agreement may not turn to the courts for relief upon its breach.
>
> * * *
>
> "The District Court took the dictionary definition as its meaning in the Act and determined that it embraced judicial action. Barrows v. Jackson, 1953, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 and Shelley v. Kraemer, 1948, 342 U.S. 1, 68 S. Ct. 836, 92 L. Ed.

116, 3 A.L.R. 2d 441, were also cited to demonstrate that legal action or court action amounts to coercion; there state action. Of course, it cannot be successfully urged that a court order or decree is not coercive, or that the mere filing of a suit and its prosecution is not likewise coercive in nature, but such an expansive interpretation of the term proves too much.

"We believe that the Congress used 'coerce' in the section under consideration as a word of art, and that it means no more than non-judicial acts of a compelling or restraining nature, applied by way of *concerted self help* consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute" (pp. 684-685, 685-686).

* * *

"In sum, we cannot attribute such a random intention to the Congress as Hardy asserts. To do so would prevent the judicial enforcement of an agreement, the validity of which was expressly preserved by that body, when there is nothing in the language of the statute or in the legislative history to indicate that the doors of the courts should be closed under the circumstances. Such a result is not to be lightly inferred, and we hold that the prohibited coercion in § 8(b)(4)(ii)(B) does not preclude judicial enforcement of a hot cargo clause left valid and enforceable under § 8(e) of the Act, as amended.

"There was no error in dismissing the counterclaim which was based on the theory that attempted judicial enforcement amounted to coercion" (Italics supplied) (pp. 687-688).

See also *Plumbers Local 5 v. NLRB,* 321 F. 2d 366, 370 (D.C. Cir. 1963) cert. den. 375 U. S. 921 (1963); *Orange Belt Painters Council v. NLRB,* 328 F. 2d 534, 537 (D. C. Cir. 1964); Jones, *Specific Enforcement of Hot Cargo Provisions in Collective Bargaining Agreements,* 6 UCLA L. Rev. 85 (1959).

In *Suburban Tile Center, Inc. v. Rockford Building and Construction Trades Council, et al.,* 354 F. 2d 1 (7th Cir.

1965), the defendant Council entered into an agreement with the Rockford Building Contractors Association which precluded the signatory contractors from contracting for work to be done by anyone who did not have a collective agreement with the Council and affiliated unions having jurisdiction over the class of work involved. Plaintiff, a non-signatory, entered into an agreement with Suarez Brothers, a contractor signatory, to sell and install certain prefabricated tile in a construction project. Defendants sought and secured from a local court an injunction permanently restraining Suarez from violating the aforesaid agreement. Suarez thereupon directed plaintiff to cease work on the project. Plaintiff sued the Union Council in the U. S. District Court for an injunction and damages, alleging breach of the Taft-Hartley Act and the federal antitrust laws. The District Court dismissed the suit. The Seventh Circuit affirmed:

> "Section 158(e) as amended in 1959 does make it an unfair labor practice for a labor organization and an employer to agree to cease doing business with another employer. But a proviso to that section specifically excludes 'an agreement between a labor organization and an employer in the construction industry relating to contracting or subcontracting of work to be done at the site of the construction . . .' It thus appears that for the construction industry, Congress has approved such contracts as the one now before us.
>
> "The National Labor Relations Board has approved agreements of this type even when not specifically limited to a particular construction site. Los Angeles Building and Construction Trades Council (Fowler-Kenworthy Electric Co., et al.) (1965) 151 NLRB No. 83, 58 LRRM 1490.
>
> "A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. Orange Belt District Council of Painters No. 48, AFL-CIO v. N. L. R. B., 1964, 117 U. S. App. D.C. 233, 328 F. 2d 534, 537; Building and Construction Trades Council of San Bernardino & Riverside Counties v.

N. L. R. B., 1964, 117 U. S. App. D.C. 239, 328 F. 2d 540. *Economic action to secure such agreements has been allowed.* Essex County and Vicinity District Council of Carpenters, etc. v. N. L. R. B., 3 Cir., 1964, 332 F. 2nd 636, 641; Construction, Production & Maintenance Laborers Union, Local 383, AFL-CIO v. N. L. R. B., 9 Cir., 1963, 323 F. 2d 422, 425. In the face of these decisions, it would be unreasonable to hold that such an agreement constitutes a violation of the anti-trust laws'' (Italics supplied) (p. 3).

The *Hardy* and *Suburban* decisions validate legal sanctions—damages, injunction, and specific preformance—to effectuate agreements under the construction industry proviso. The voluntary compliance[2] achieved by the Respondents herein is far milder than in those judicially-approved instances.

The Board's brief concedes (p. 14, n. 10) that "the courts may grant damages, specific performance, declaration of rights and other appropriate relief to insure that the [construction industry exemption] retains the value which Congress meant to preserve for it". The Board adduces no sound logical or legal basis for its conclusion that the Act somehow prohibits the Respondents from achieving voluntary compliance with an admittedly valid subcontracting clause, as in the instant case. The dissenting Board Member Fanning correctly concluded: "To label the right of termination a form of unlawful economic pressure is to beg the issue, rather than to answer it" (R. 130).

Manifestly, the "termination clause" supplements and supports the basic "subcontracting clause". As correctly interpreted by dissenting Board Member Fanning:

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[2] See O. W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897): "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference" (p. 462).

> "Were I to agree with the majority that the contractual right of termination constitutes 'economic pressure' and places the clause outside the protection of the proviso to 8(e), I would, perforce, find the entire clause invalid. The clause in issue operates as a restriction on the employer's right to subcontract solely by virtue of the fact that the IBEW has the right to cancel its entire agreement if the employer subcontracts work to subcontractors who do not have agreements with appropriate IBEW Locals. The entire clause constitutes an implied agreement not to subcontract to such subcontractors. The two parts of the clause are not severable. The majority is rewriting the parties' contract to the extent it finds that a restriction on subcontracting survives its striking down of the termination provision. Surely, if it is true as the majority states, and as I agree, that our function is not to administer the law of private contracts, it is all the more true that our function does not include rewriting contracts of the parties. *Employing Lithographers of Greater Miami Florida v. N.L.R.B.*, 301 F. 2d, 20, 28, enforcing 130 NLRB 968, as modified in pertinent part" (R. 128, n. 22).

The Board is empowered to effectuate but not to rewrite the agreement made by the parties. *NLRB v. C & C Plywood Corp.*, 385 U. S. 421, 427-428 (1967). The "termination clause" simply and plainly expresses the Respondents' right to rescind where, as here, the prime contractor committed a material breach by violating the "subcontracting clause". This follows a widely accepted principle of contract law. 17A C.J.S. *Contracts* Sec. 422(1), p. 521 (1963); Williston, Contracts, Secs. 683, 893A (3d ed.). The courts have applied this contract principle in appropriate cases in the context of the National Labor Relations Act. *E.g., United Electrical Workers v. NLRB (Marathon Electric Co.),* 223 F. 2d 338 (D.C. Cir. 1955), *cert. den.* 350 U. S. 981 (1956); *Boeing Airplane Co. v. NLRB,* 174 F. 2d 988 (D.C. Cir., 1949); *Boeing Airplane Co. v. Machinists Lodge 751,* 91 F. Supp. 596, 609, *aff'd.* 188 F. 2d 356 (9th Cir. 1951), *cert den.* 342

U. S. 821 (1951); *Neuffer v. Bakery Union,* 307 F. 2d 671 (D.C. Cir. 1962) (forfeiture clause).[3]

Board Member Fanning correctly analyzed the statutory provisions in his dissenting opinion:

> "Thus, the controlling distinction is that between economic action, such as strikes, picketing, and other related conduct, on the one hand, and resort to recognized legal or judicial remedies for breach of contract on the other. Clearly, the IBEW lawfully could have filed suit for damages or specific performance for the breach of its agreement and, if the latter were ordered, obtained precisely the same result as it did herein. But another, long-accepted, remedy is available to a party to a contract when the other party commits a material breach of that contract. That remedy is the right to rescind the contract. As stated in *Corpus Juris Secundum,* 'On a material breach of the contract the injured party may elect to rescind the contract or to stand on it.' Certainly the articulation within the contract of this lawful right of election of remedies should not have the anomalous effect of rendering unlawful the exercise of that right, particularly where there is not the slightest evidence that the Congress, having granted specific contractual rights to employers and unions in the construction industry, then intended to deprive the parties to such agreements of the well-established remedies for breach of those very rights. I would find that the election of this remedy, like that of seeking judicial enforcement, is a lawful form of action and not a prohibited act of coercion under Section 8(b)(4).
>
> "Finally, the majority's conclusion cannot be supported on the theory that termination of the contract will be followed by a strike or picketing; a 'no contract-no work' theory. The record herein will not sustain a finding that the termination threat included a threat to withdraw men or to picket Ets-Hokin. Indeed, the Trial

[3] The decision in *Packinghouse Local 721 v. Needham Packing Co.,* 376 U.S. 247 (1964), relied upon by the Board (Br. 14, n. 11), is obviously distinguishable on the facts and the arbitration clause there involved. 376 U.S. at 250-252. See *Boeing Co.* v. *UAW,* 370 F. 2d 969 (3d Cir. 1967).

> Examiner was quite careful to refrain from making any such finding. And, while these events could occur or could be thought likely to occur, such supposition will not satisfy the General Counsel's burden of proving they did occur or were actually threatened." (R. 130-131)

This analysis is fully confirmed by recent Supreme Court decisions. In *Fiberboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), the Supreme Court held that a union's proposal to bar "subcontracting out" was a mandatory subject of collective bargaining under Sections 8(a)(5) and 8(d) of the Act. Equally mandatory is the duty to bargain about clauses "relating to the contracting or subcontracting at the site," validated under the construction industry exemption. See *Suburban Tile Center v. Rockford Council,* 354 F. 2d at 3 (7th Cir. 1965), quoted *supra* pp. 13-14. In upholding "will not handle" clauses involved in the *Woodwork* case *supra,* the Supreme Court said (386 U.S. at 643):

> "It would therefore be incongruous to interpret §8(e) to invalidate clauses over which the parties may be mandated to bargain and which have been successfully incorporated through collective bargaining in many of this Nation's major labor agreements".

This statement is equally applicable to the contract clauses in the instant case.

In *NLRB v. Operating Engineers Local 12* (Engineers, Ltd.) 323 F. 2d 545 (9th Cir. 1963), the employer had discharged an employee who had not been referred by the union hiring hall. The Board found the employer in violation of Section 8(a)(3) of the Act; and also found the Union in violation of Section 8(b)(1)(A) of the Act, making it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of their organization rights under the Act. This Court reversed, holding that the discharge was privileged under the applicable contract, which provided for exclusive but nondiscriminatory hiring through the union hiring hall. This Court concluded that

the Act does not preclude the Union from "persuading the employer to comply with a binding agreement"; and that "the Union was within its rights in demanding that the Employer obtain its workmen" through the hiring hall. It should be emphasized that such hiring hall clauses are mandatory subjects of collective bargaining. *NLRB v. Tom Joyce Floors Inc.,* 353 F. 2d 768 (9th Cir. 1965); *NLRB v. Houston Chapter AGC,* 349 F. 2d 449 (5th Cir. 1965).

It was unnecessary to file suit in this case because Ets-Hokin conceded that it was in violation of the "subcontracting clause". A suit for rescission would simply have resulted in the declaration of the elementary principle of contract law that an admitted material breach of an agreement by a party to a contract empowers the other party to elect to rescind. Had such a suit been filed (or threatened), and had it been settled by compliance before judgment, such action would have been clearly lawful even under the Board's theory of the law. The instant case is not different in any material respect from the stated illustration.

II. The Board Erred in Concluding that Respondents Violated Section 8(b)(4)(ii)(A) of the Act

The foregoing discussion of the construction industry exemption to Section 8(e) likewise establishes that the Board erred in finding that Respondents used prohibited means for an object of "forcing or requiring any employer . . . to enter into any agreement" prohibited by Section 8(e). This Court's decision and reasoning in *Laborers Local 383 v. NLRB (Colson & Stevens Construction Co.), supra,* are clearly decisive. The Unions there involved caused picketing of construction sites in Phoenix, Arizona at which the Colson & Stevens firm was engaged as general contractor, in order to obtain an agreement that any subcontractors on job sites would be bound by the terms of the agreement. During the picketing, and for some months previously, Colson & Stevens had outstanding subcontracts with nonunion

subcontractors for construction work which was subject to the basic agreement. There, as here, the Board analyzed the literal language and legislative history of Section 8(b)(4), and concluded that the unions had violated Subdivisions (A) and (B) thereof, notwithstanding the construction industry exemption in Section 8(e). This Court reversed:

> "As to §8(b)(4)(A), the Board's position is that the §8(e) proviso must be construed as applying only to agreements voluntarily entered into; that while such an agreement is not unlawful under §8(e) when voluntarily reached, picketing to secure it is unlawful under §8(b)(4)(A).
>
> "It may well be that §8(e) itself is addressed only to voluntary agreements; *it is not §8(e) but §8(b)(4)(A) which prohibits coercion.* However, (A) prohibits it only where the object of the coercion is an agreement which is 'prohibited' by §8(e) from voluntarily being reached. The effect of the proviso is to exclude from that prohibition the subcontracting clause here at issue, and the two sections read together, as they are intended to be read, say most clearly that if such an agreement may voluntarily be reached, picketing to secure it is not made unlawful.
>
> "The Board protests that the legislative history supports their construction. We cannot agree" (Italics supplied).

The NLRB subsequently accepted the interpretation of this Court on the facts of *Colson & Stevens.* See *Northeastern Indiana Building & Construction Council (Centlivre Village Apartments Inc),* 148 NLRB 854, 57 LRRM 1081 (1964), reversed on other grounds 352 F.2d 696 (D.C.Cir. 1965).

The Board's fundamental error in *Colson & Stevens, supra,* as in the instant case, lies in the attempt to read together, and apply to the construction industry, language inserted by the 1959 Act in Section 8(b)(4)(ii)(A) and

Section 8(e), while ignoring the construction site exemption which was inserted at the same time in 1959. Respondents' actions in the instant case, involving no strike, picketing or threats thereof, fall outside the scope of Section 8(b)(4)(ii)(A), even more clearly than in *Colson & Stevens,* where the unions admittedly picketed the construction site.

III. The Board Erred in Concluding that Respondents Violated Section 8(b)(4)(ii)(B) of the Act

The argument and precedents discussed above already dispose of the Board's conclusion that the Respondents also violated Section 8(b)(4)(ii)(B) by entering into and obtaining voluntary compliance with the agreement here involved. Briefly:

A. Respondent's Agreement and Action Relating to Work at the Glen Canyon Construction Site Did Not Violate Section 8(b)(4)(ii)(B)

In *Sheet Metal Local 48 v. Hardy Corporation,* quoted *supra,* the Court specifically held that § 8(b)(4)(ii)(B) does not preclude judicial enforcement of a contract validated under the construction industry exemption. In this context, the Court concluded that the "coercion" prohibited by Subd. (B) means "concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in a background of a labor dispute" (322 F.2d at 686).

Respondents in the instant case engaged in no strike, picketing, handbilling, or non-referral, nor did Respondents threaten such action. Respondents did not even seek (since it was not necessary) to obtain the judicial enforcement upheld in *Hardy.* Respondents had an agreement with "an employer in the construction industry." The agreement, as the Board itself found, was one "relating to the contracting or subcontracting of work to be done at the site" of construction. Respondents' action, strictly pursuant to the agreement, amounted to no more than persuading or insist-

ing that the Employer "comply with a binding contractual agreement". *NRLB* v. *Operating Engineers (Engineers Ltd.), supra.*

This case does not present the issue whether agreements otherwise valid under the construction industry exemption may be effectuated by strikes or picketing with or without union inducement. Compare *NLRB* v. *Plumbers Local 217 (Carvel Co.),* 361 F.2d 160, 163-164 (1st Cir. 1966); *NLRB* v. *Bricklayers Local 5 (Greater Muskegon Assn.)* 65 LRRM 2563 (6th Cir. 1967).

Another recent decision by the Supreme Court involved a Union which threatened and imposed fines on its members, and sued to collect such fines, when they crossed Union picket lines and returned to work during a strike authorized by the Union. The Seventh Circuit held that the Union violated Section 8(b)(1), making it an unfair labor practice for a labor organization "to restrain or coerce" employees in the exercise of their right under Section 7 "to refrain from" concerted activities. *Allis-Chalmers Mfg. Co.* v. *NLRB,* 358 F.2d 656. The Supreme Court reversed, upholding the Union action in the light of the proviso stating that Section 8(b)(1) shall "not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein". U. S. Sup. Ct., 35 L.W. 4623 (decided 6/12/67).

The *Allis-Chalmers* decision arises under a different statutory provision from that involved in the instant case. However, it supports our contentions herein that statutory language such as "coerce" and "restrain" must be read as words of art, in the particular context of the Congressional purpose; and that provisos to such wording must equally be given full force and effect as intended by Congress.

The Board's brief errs in equating a "threat" to rescind, under the termination clause, with "coercion" proscribed by Section 8(b)(4)(ii)(B). Since the construction industry

exemption admittedly validates the subcontracting clause applicable to work at the construction site, the supporting clause permitting actual rescission in case of violation thereof is no less valid. *A fortiori,* Respondents had the legal right to insist that Ets-Hokin comply with the subcontracting clause or face the consequence of rescission. Since the Act does not bar judicial enforcement, presumably it would not bar compliance negotiated by the parties after filing an enforcement suit or a rescission suit but before judicial judgment. *A fortiori,* the Act does not bar compliance obtained under a contract clause without resorting to the courts. In this context, Section 8(b)(4)(ii)(B) prohibits only *concerted* "self-help" in the form of strike or picketing or threat thereof, under circumstances not involved in the instant case.

The history of litigation under Section 8(e) lays bare the Board's basic hostility to the construction industry proviso. In *Colson & Stevens* and in *Hardy, supra,* the courts rejected the Board's erroneous views on "coercion" based on the Board's refusal to heed the statutory language and purpose. Here, as in those cases, "reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. . . . The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress". See *NLRB* v. *Brown,* 380 U.S. 278, 291 (1965); *American Shipbuilding Co.* v. *NLRB,* 380 U.S. 300, 318 (1965).

It should be noted in the instant case that the Trial Examiner formulated his theory of "coercion" on the basis of the decision of the District Court in the *Hardy* case, later reversed by the United States Court of Appeals for the Fifth Circuit.

B. The Board erred in concluding that Respondents violated the Act by alleged "sympathetic action" outside the Glen Canyon construction site.

The Board found that "the contracting clauses are found only in contracts with the IBEW applicable to the construction industry and that Ets-Hokin was performing the type of work found in the contract" (R. 120). The Board's brief in this Court states (p. 2) that "the unfair labor practices . . . occurred at the Glen Canyon Dam Construction site in Northern Arizona within this judicial circuit." The charges and the complaint herein concern the impact of the agreement and the action at the Glen Canyon site, specifically centering on the subcontract to Rose-Phoenix. The Board concluded that Respondents had violated Sections 8(e) and 8(b)(4)(ii)(A) and (b) and by their agreement and action relating to Rose-Phoenix at the Glen Canyon site (R. 119-124), separate and apart from the alleged "sympathetic action" beyond the confines of Glen Canyon.

It is true that under the agreement with Local 769, any violation by the contractor "will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union" (Art. II, Sec. 8). However, only IBEW President Freeman could make the finding of fact upon the basis of which the Local could cancel or threaten to cancel the agreement. The Decision included the unsupported conclusion that—

> "by canceling its collective bargaining agreement with Ets-Hokin because of violation of the subcontracting clause, Local 769 could have practically forced Ets-Hokin out of business in the whole United States. The threat of contract cancellation was therefore a powerful private sanction to insure compliance with the subcontracting clause" (R. 120).

There is no finding or evidence whatever that the Respondents threatened to picket or strike the Glen Canyon project or any other Ets-Hokin projects throughout the

country; or to refuse to refer applicants for jobs at Glen Canyon or elsewhere; or to force Ets-Hokin or Rose Construction Company out of business in Arizona or elsewhere.

NLRB v. News Syndicate Co., 365 U.S. 695 (1961).

The above quoted Board conclusion is directly contrary to the only mention of this issue in the entire record:

> "Q (By Mr. Mast to Mr. Ets-Hokin) Now, from your experience in the building-and-construction trades, and specifically in contracting in this area, what would be the effect, the practical effect . . . . of the revocation of an agreement, a nation-wide agreement with the IBEW?" (Tr. 33)

Counsel for Local 769 objected to the question on the ground that "the answer would be speculative at the very best" (Tr. 33). The Trial Examiner sustained the objection:

> "TRIAL EXAMINER: I am inclined to agree with that unless Mr. Mast has some specific thing in mind on which you can predicate an inference that Mr. Ets-Hokin anticipated some specific result as coincidental with the termination of his national agreemnt in effect with the IBEW, so that the objection to the last question which you put is sustained, Mr. Mast" (Tr. 45)

The objection was also sustained to Respondent IBEW (Tr. 34). Indeed, there is no evidence that any other Local threatened to cancel its agreement with Ets-Hokin or even knew of the Rose-Phoenix dispute. Nor is there any evidence to show that any other Local Union of the IBEW notified any other employer of any difficulties with Ets-Hokin.

The Board's quotation from Respondent's supplemental memorandum below (R. 120) is taken out of the entire context of that memorandum which completely negatives the Board's speculative and unwarranted conclusion. The memorandum further stated:

"In summary, while the battle cry of 'no contract, no work' may be highly appealing from a journalistic point of view—and may even actually represent the position of certain unions in certain industries in a bygone era—there is no evidence in the record to show that this catchphrase in any way represented the attitude of the IBEW or Local 769 *vis-a-vis* Ets-Hokin during the period in litigation. In point of fact, probably no union imposes greater restrictions on strike action than the IBEW. See *Parks v. IBEW,* 52 LRRM 2281 (CA 4, 1963).

"In the *Parks* case, a local union of the IBEW and certain of its members sought to set aside the revocation of the local's charter by the International. The revocation action complained of was taken by the IBEW after the local's members went out on strike without the International's approval, and failed to return to work in defiance of the International President's repeated directions to do so. The Fourth Circuit upheld the revocation action.

"The important point is that the local's strike took place at a time *when there was no operative contract in effect between the IBEW and the employer involved.* See *Local 28, IBEW v. Maryland Chapter, NECA,* 48 LRRM 2285 (USDC Md., 1961). Nevertheless, the International Union ordered work to continue, further rebutting the General Counsel's bland assertions as to the inevitability of strike action. The fallacy of the "no contract, no work" slogan is conclusively demonstarted in the case of the IBEW by this judicial decision of which the Board must take judicial notice.

"Certainly in the framework of such a union, where any strike action is so rigidly controlled, unfounded statements concerning the inevitability of such action against Ets-Hokin are not to be lightly tossed about".

In these circumstances, the supplemental memorandum continued:

"If the Board were to rule that the legal act of rescission of an agreement is illegal in itself, then the Board would be frustrating the unquestionably legal operation of the 8(e) proviso contracts of the IBEW.

> It is undisputed here that an employer can agree to such a clause and that he may honor his obligation. As we have seen, the Fifth Circuit Court of Appeals has ruled that he may be required by legal decree not to breach his obligation. If the Board rules, however, that a breach of the 8(e) proviso contract by an employer such as Ets-Hokin cannot be made the subject of rescission, then how will the 8(e) proviso contracts with other contractors be applied? Would not the Board be forcing the union to put contract breakers in the same category as those who honor their contracts?"

The Board's unsupported conclusion is also contrary to uncontroverted Exhibit 2 put in evidence by the General Counsel, which lists Ets-Hokin's uncompleted jobs as of April 1, 1963, in its capacity as *prime contractor* for numerous large U. S. or State governmental enterprises and numerous large private enterprises throughout the United States. It is absurd to conclude that Respondents were in position to take this business away from Ets-Hokin or force it out of business throughout the United States. The "contractor's clause" in question could only affect Ets-Hokin as a subcontractor—not as a prime contractor. Obviously, "contractor clauses" cannot be made the subject of agreements with the State and Federal Governments or public utility corporations.

The undisputed facts in the entire record, therefore, contradict the Board's unsupported inferences that Respondents threatened destruction of Ets-Hokin's operations throughout the United States.

In any event, the Board's legal position on "coercion" is contrary to the legislative intent and to settled precedents. *Supra,* pp. 8-22; cf. *Suburban Tile Center, Inc. v. Rockford Council,* supra; *Int'l Brotherhood of Teamsters* (Alexander Warehouse Co.), 128 NLRB 916, 918-919, 46 LRRM 1409 (1960); *Case No. F-228,* Adm. Ruling of General Counsel, 41 LRRM 1140 (1957); see also *Houston Insulation Assn. v. NLRB,* 386 U.S. 664 (1967).

IV. The Board Erred in Refusing to Find that Respondents Were Entitled to Terminate the Agreement Because the Davis-Bacon Act Was Violated on the Glen Canyon Site

A. Rose-Phoenix flagrantly violated the Davis-Bacon Act on the site

Attached to the specifications in the contract entered into between Ets-Hokin and Rose-Phoenix (IBEW Exh. 6) are the rates of pay which were to be paid for the work in question to the employees involved, pursuant to wage determinations by the Secretary of Labor under the Davis-Bacon Act. The specifications also contained the correct classifications for the employees on the job; e.g., "iron workers" who are engaged in their trade doing work such as "reinforcing," "structural" and "ornamental" iron work; laborers, describing typical labor work on all types of construction jobs; and "Line Construction," such as linemen, equipment operators, and equipment mechanics. The wage rates for the latter employees are substantially higher than those for employees classified as iron workers or laborers. Actually they are identical with those included in the IBEW contract with Ets-Hokin. Compare the rates in the contract of S. W. Line Constructors (G.C. Exh. 8), assented to by Ets- Hokin (G.C. Exh. 7) with the rates and specifications required for Glen Canyon (IBEW Exh. 6). The subcontractor was also required to acknowledge that he has read the said determination by the Secretary of Labor and is fully familiar with them; to execute a Prevailing Wage Certificate as a prerequisite to any payment from the contractor; and to post a copy of the applicable prevailing wage determinations; and to meet other requirements regarding apprentices and the like (G.C. Exh. 17).

On the other hand, the agreement between Rose-Phoenix and Operating Engineers Local 428 provided for payment of the iron worker and laborer rates (Tr. 282); that is,

rates substantially below the legally applicable rates under the Davis-Bacon Act. The Bureau of Reclamation expressly found that Rose-Phoenix was violating that Act, and directed compliance (Resp. IBEW Exh. 7). Respondents repeatedly advised Ets-Hokin of such noncompliance (Tr. 88, 95, 101).

B. Respondents were entitled to rescind the agreement on that ground

The United States Constitution and applicable Federal laws are part of every contract made, and the law thus embraced in such contracts affects the validity, construction, discharge and enforcement of the contract. See 17A C.J.S. *Contracts,* para. 330, pages 229, 301 (1963). Similarly, every contract implies that the parties thereto will do and perform those things which, according to reason and justice, they should do in order to effectuate the purpose for which the contract was made. Conversely, there is an implied agreement to refrain from doing those things which will destroy or injure the other party's right to receive the fruits of the contract. *Id.,* at para. 328. As stated in *Williston on Contracts:*

> "The underlying principle [of conditions] is that there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing." (Sec. 670).

For example, in *Watson Brothers Transportation Company v. Jaffa,* 143 F. 2d 340 (8th Cir. 1944), the defendant leased to plaintiff all rights under his interstate trucking franchise. The parties then submitted their agreement to the Interstate Commerce Commission for approval. The Commission ordered them to submit further documents before approval could be given. Plaintiff requested that defendant execute such documents, but defendant refused and, instead sold the same rights to another. Plaintif

brought suit asking specific performance to force the defendant to execute the necessary papers. The District Court dismissed the action and, on appeal, the Eighth Circuit reversed. The Court noted that there was no express provision in the contract requiring the defendant to cooperate in securing the approval of the Commission, but stated that a contract contains not only express provisions, " . . . but in addition all implied provisions indispensable to effectuate the intention of the parties and to carry out the contract, and in the absence of which the contract could not be effectively performed" (143 F. 2d at 348). To determine the applicability of this principle, the Court said that one must examine the nature of the contract, the circumstances under which it was made, the situation of the parties and the object that each had in making the contract. In the light of these factors, the Court held that the cooperation of the defendant in securing Commission approval was implied. See also *Sacramento Navigation Company v. Salz,* 273 U.S. 326, 329 (1927).

By reason of Rose-Phoenix's deliberate violation of the Davis-Bacon Act, Ets-Hokin breached this implied condition of his agreement with Respondents. Since this breach was material, and went to the essence of the agreement, Respondents were entitled to elect to rescind.

The Board agreed that "under the Davis-Bacon Act the general contractor is responsible for the subcontractor's meeting the Davis-Bacon rates in the contract" (R. 122); but argued that this was not "the sole, or even the main, reason" for canceling the agreement. This finding is unsupported by substantial evidence on the record as a whole. The undisputed evidence established that the Davis-Bacon Act violation was one of the two separate grounds for termination advanced by Respondents (Resp. Exh. 7; GC Exh. 4; Tr. 350); and that Rose-Phoenix made only temporary and half-hearted efforts to comply with the directive by the Bureau of Reclamation (Tr. 325-326).

CONCLUSION

For the foregoing reasons, the Board's petition for enforcement should be denied.

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Certificate

I certify that, in connection with the preparation of this brief, I have examined the provisions of Rules 18 and 19 of this Court, and that in my opinion, the foregoing brief is in full compliance with these Rules.